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No. 705

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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SWITCHMEN'S UNION OF NORTH AMERICA, An Unincorporated Labor Union; R. H. MORITZ; L. B. HILL; and V. H. WORKMAN, *Petitioners,*

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A Corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, An Unincorporated Labor Union.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statute involved | 3 |
| Statement | 4 |
| Specifications of errors to be urged | 7 |
| Reasons for granting the writ | 8 |
| Conclusion | 15 |


## CITATIONS

CASES:


*J. I. Case* v. *NLRB*, 321 U.S. 332 ..... 9
*Ford Motor Co.* v. *Huffman*, 345 U.S. 330 .....9, 12
*Graham* v. *Brotherhood of Firemen*, 338 U.S. 232 .. 9
*NLRB* v. *Gottfried Baking Co.*, 33 LRRM 2550 (C.A. 2, February 15, 1954) ..... 13
*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 . 9
*NLRB* v. *Lummus Co.*, 210 F. 2d 377 (C.A. 5) ..... 13
*NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 ..... 9
*Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 ..... 9
*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 ..... 9
*Radio Officers* v. *NLRB*, 347 U.S. 17 .....8, 9, 10, 11, 13
*Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192 ..... 9
*Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548 15


STATUTES:


National Labor Relations Act, as amended, Section 8(a)(3) (29 U.S.C. (Supp. V) 158(a)(3)) .....9, 10, 13, 14, 15

Railway Labor Act, Section 2 (45 U.S.C. 152):

Third .....2, 3, 4, 7, 8, 9, 12, 13, 14, 15
Fourth .....2, 3, 4, 7, 8, 9, 12, 13, 14, 15
Fifth ..... 12
Eleventh ..... 13
Eleventh (d) ..... 12

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The Switchmen's Union of North America, R. H. Moritz, L. B. Hill and V. H. Workman pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on January 2, 1954.

### OPINIONS BELOW

The opinion of the District Court (oral statement R. 275-279) is unreported. The opinion of the Court of Appeals (R. 286-290) is reported in 209 F. 2d 419.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1954 (R. 291). On March 31, 1954, by order of Mr. Justice Clark, the time in which the petitioners might file a petition for a writ of certiorari in this case was extended to and including May 3, 1954 (R. 291). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Whether a carrier interferes with, influences, or coerces its employees in the exercise of, or denies them, rights of choice of representatives and membership in labor organizations, in violation of Section 2, Third and Fourth, of the Railway Labor Act, as amended, by adhering to and enforcing a collective bargaining agreement which:

(a) Gives the exclusive collective bargaining agent discretionary control over certain aspects of employment, by requiring the carrier, unless it secures the consent of the exclusive collective bargaining agent, to refuse reinstatement to employment, after a break in service of six months or more, to any employee who has not chosen such exclusive collective bargaining agent or another named union to represent him in the handling of his claim for reinstatement.

(b) Discriminates against employees seeking reinstatement to employment who do not choose to be represented in the handling of their reinstatement claims by the exclusive collective bargaining agent or one other named union, by preventing their reinstatement without the consent of the exclusive collective bargaining agent, and in favor of employees who do choose to be so represented, by permitting their reinstatement by the carrier without such consent.

2. Whether the refusal of a carrier, acting pursuant to the collective bargaining agreement described in Question 1,

to reinstate an employee solely because the exclusive collective bargaining agent has not consented thereto, violates Section 2, Third and Fourth, of the Railway Labor Act, as amended.[1]

**STATUTE INVOLVED**

Section 2, Third and Fourth, of the Railway Labor Act, as amended (45 U.S.C. 152, Third and Fourth), insofar as here material, provides as follows:

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[1] The carrier admitted that the sole reason for its refusal to reinstate the three individual petitioners was the failure of the Trainmen's Union to consent (R. 45-46, 56-58, 80, 229). In Finding XVII (R. 177), the District Court found that on September 22, 1952, the carrier refused reinstatement until such time as the union concurred. However the District Court in Finding XXIII (R. 178) recited that at the time this suit was begun the individual petitioners sought back pay, the carrier was never willing to give them back pay, and the failure of the union to consent "is" not the sole cause of the carrier's refusal to reinstate. Since the District Court's findings (Findings XV, XVII, XVIII, R. 176-177) disclose that there was no request for back pay at the time the refusals to reinstate occurred on September 22, 1952, the word "is" in Finding XXIII may be read literally as having reference only to the carrier's refusal to reinstate after this suit was begun (R. 218-219). In the event Finding XXIII is read as meaning that the carrier's pre-suit refusals were motivated by reasons other than the failure of the union to consent, should certiorari be granted, we will urge that Finding XXIII is unsupported by any evidence. The record is clear that from June 13, 1952 (R. 229, 17-18, 100-102) until subsequent to the carrier's unequivocal letters of September 22, 1952, making reinstatement conditional upon the consent of the Trainmen's Union (R. 217, 21, 107, 108), the individual petitioners asked reinstatement without back pay (R. 217, 229). Nor is there a scintilla of evidence that after that date the individual petitioners would ever have refused reinstatement without back pay or that any request on their part for back pay motivated the carrier in the slightest respect in its failure to reinstate them. In the present suit counsel for the petitioners has made it clear that the individual petitioners are suing only for back pay from and after the date the carrier would have reinstated them but for its insistence upon the consent of the Trainmen's Union (R. 220, 239).

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. * * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. * * * No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * * "

## STATEMENT

This suit was brought in the United States District Court for the District of Utah by the three individual petitioners, Moritz, Hill and Workman, and by the Switchmen's Union of North America, to enjoin the Ogden Union Railway and Depot Company, hereinafter called the carrier, and the Brotherhood of Railroad Trainmen, hereinafter called the Trainmen's Union, from giving effect to a provision in the collective bargaining agreement between the carrier and the Trainmen's Union known as the Note to Article VIII, Rule 38, and to require the carrier to reinstate the three individual petitioners to their former employment with back pay (R. 3-14, 91-99). The petitioners attacked the validity of the Note and the refusal of the carrier to reinstate the individual petitioners as violative of Section 2, Third and Fourth, of the Railway Labor Act, as amended (R. 5-7, 98-99). The case was tried on the merits in the

District Court (R. 180-225). Most of the material facts were alleged in the second amended complaint (R. 91-99, 3-14) and admitted by the answers (R. 108-113, 114-118). There was no conflict in any of the testimony given at the trial (R. 180-225). The undisputed facts as found by the District Court are as follows:[2]

The individual petitioners, Moritz, Hill and Workman, were each employed by the carrier as a yard switchtender (R. 173-174; 4, 92, 109, 183, 185, 187). On March 8, March 11, and April 2, 1952, respectively, the carrier terminated the employment of Moritz, Hill and Workman for infractions of its rules (R. 176; 4, 93, 110, 183, 185, 187). Each of the three was, prior to, at the time of, and at all times since his purported dismissal, a member of the Switchmen's Union and gave the Switchmen's Union his power of attorney to represent him in handling his claims with the carrier (R. 176; 7, 15-16, 93, 94, 100, 184-186, 188).

The Switchmen's Union presented the claims of Moritz, Hill and Workman for reinstatement to the carrier (R. 176; 7-8, 16-20, 94, 100-104, 110-111, 194-197, 224-225). The carrier handled the application for reinstatement of Moritz, Hill and Workman with the Switchmen's Union and negotiated fully and freely through correspondence and personal conferences with the Switchmen's Union as the designated representative of the individual petitioners (R. 177; 7-8, 18-20, 94-95, 102-106, 110-111, 194-195, 224-225). On September 22, 1952 the carrier advised the Switchmen's Union that it had referred each of the individual petitioners' cases to the Trainmen's Union, that the latter had not yet handled the cases nor indicated its concurrence in the return to service of the individual petitioners and that the carrier refused reinstatement of each of the individual petitioners until such time as it received the concurrence thereto of the Trainmen's Union (R. 177; 8-9, 21, 45-46, 56-58, 80, 95, 97, 98, 107-108, 111, 113, 229). In so refusing rein-

[2] In the following statement the references preceding the semicolons are to the findings of the District Court; the succeeding references are to the supporting evidence.

statement until the Trainmen's Union should concur in such reinstatement the carrier relied upon a Note to Article VIII, Rule 38 of a collective bargaining agreement entered into between the carrier and the Trainmen's Union on October 1, 1942 (R. 174-175, 177; 4-9, 21, 45-46, 56-58, 95, 97, 98, 107, 108, 109, 111, 112-113, 229). The Note in question reads as follows (R. 175; 4-5):

> "Note—Reinstatement will not be permitted after the expiration of six months from date of dismissal unless agreeable to the management and the general committee,[3] except that a case pending with either the B.R.T.[4] or O.R.C.[5] at the expiration of the six month period, will not be prejudiced. Where the yardman involved has been out of service six months or less it will not be obligatory to consult the committees representing these classes of employes in considering the case for reinstatement."

The Trainmen's Union is now and at all times here material has been the exclusive collective bargaining representative of the yardmen employed by the carrier (R. 174; 4, 112-113).

The District Court concluded as a matter of law that the Note was lawful, that the carrier had not applied the Note in a discriminatory manner and had not violated the Railway Labor Act (R. 178-179).[6]

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[3] The phrase "general committee" in the Note refers to the committee of the Trainmen's Union which acts for the Trainmen's Union in the handling of claims with the carrier.

[4] The initials "B.R.T." in the Note refer to the Trainmen's Union.

[5] The initials "O.R.C." in the Note refer to the Order of Railway Conductors which like the Switchmen's Union is a minority union in reference to the craft or class of yardmen on the carrier.

[6] Although the District Court stated as a conclusion of law that the petitioners had not exhausted the administrative remedies which they have under the Railway Labor Act to present their claims before the National Railroad Adjustment Board (R. 179), it made no reference to this conclusion in its judgment which was entered on the merits.

The District Court accordingly entered its judgment expressly adjudging the Note and its application to the petitioners to be lawful and dismissing the case on the merits (R. 179-180).

Upon appeal to the United States Court of Appeals for the Tenth Circuit the judgment below was affirmed (R. 291).

In its opinion the Court of Appeals erroneously stated that the District Court had dismissed the case for want of jurisdiction (R. 286). The Court of Appeals stated that the District Court would have had jurisdiction of the case if the validity of the agreement had been involved (R. 288). It upheld the assumed dismissal because it agreed with the District Court that the Note was valid (R. 289). It reached this conclusion by observing that the Note dealt with the composition of the roster of employees of the carrier, "a matter certainly within the bargaining province of the two parties most affected," that "it is not fatal that the incidents of the contract may have unfavorable effects on some members of the craft represented" and that it was not here concerned with "a deliberate hostile bargaining attempt to discriminate against one group of employees in favor of another" (R. 289).

## SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that since the composition of the roster of employees of a carrier is a proper subject matter for collective bargaining it is not a violation of Section 2, Third and Fourth, of the Railway Labor Act, as amended, for a carrier to enter into a collective bargaining agreement which requires the consent of the exclusive collective bargaining representative before the carrier may reinstate employees who are not represented in the handling of claims for reinstatement by that representative but not before it may reinstate those so represented by that representative.

2. In holding that since a collective bargaining agreement may properly make differences between employees affected,

a provision adversely affecting employees only because they choose not to be represented by the exclusive collective bargaining representative in the handling of claims for reinstatement, does not violate Section 2, Third and Fourth, of the Railway Labor Act, as amended.

3. In holding that the Note to the collective bargaining agreement here involved is lawful.

4. In holding that the absence of a deliberate hostile attempt to discriminate prevented the carrier's conduct from constituting a violation of Section 2, Third and Fourth, of the Railway Labor Act, as amended.

5. In failing to hold that the carrier, by conditioning the right of the individual petitioners to reinstatement upon the consent of a union, violated Section 2, Third and Fourth, of the Railway Labor Act, as amended.

6. In holding that the carrier did not violate Section 2, Third and Fourth, of the Railway Labor Act, as amended, by refusing to reinstate the individual petitioners.

7. In holding that the instant suit did not involve the validity of a contract but solely its interpretation and application.

8. In affirming the judgment of the District Court.

## REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the principle of this Court's decision in *Radio Officers* v. *NLRB*, 347 U. S. 17. If Congress had not divided its legislation for railway and non-railway employees into two separate statutes there would be a square conflict. The period within which to petition the court below for a rehearing expired eleven days prior to this Court's decision in the *Radio Officers* cases, and therefore the court below did not have the advantage of this Court's guidance.

The decision of the court below leaves the meaning of Section 2, Third and Fourth, of the Railway Labor Act,

as amended, in opposition to and inconsistent with the construction placed upon its analogue in Section 8(a)(3), of the National Labor Relations Act, as amended (29 U.S.C. (Supp. V) Section 158(a)(3)), by this Court's decision in the *Radio Officers* cases.

While the words used in relevant portions of these two Acts are not the same, there is nothing in the difference in phraseology which in anywise supports the very opposite construction placed upon the Railway Labor Act by the court below as contrasted with this Court's construction of the National Labor Relations Act in the *Radio Officers* cases.[7]

Section 8(a)(3) of the National Labor Relations Act, as amended, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". Section 2, Third, of the Railway Labor Act, as amended, provides that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." Section 2, Fourth, provides that "No carrier * * * shall deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier * * * to influence or coerce employees in an

[7] This Court in the *Radio Officers* cases (347 U.S. at 48) cited cases arising under the Railway Labor Act. The comparable character of many of the substantive provisions of these two statutes has often been the subject of comment by this Court. It has cited cases under the two acts interchangeably and relied on cases under one act for construction of the other. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44, 45, 47; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188; *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266-267; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 347; *J. I. Case* v. *NLRB*, 321 U.S. 332, 336; *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 200, 202; *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 238; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 332, n. 4, 337.

effort to induce them to join or remain or not to join or remain members of any labor organization".

Both *Radio Officers* and the instant case are characterized by the fact that the employers gave unions serving as exclusive collective bargaining agents the power to cause the employers to discriminate against employees at the discretion of the unions. Thus, the positions of the employers with respect to Fowler for example, in *Radio Officers,* and the three petitioners here, are parallel. The employers wanted to give jobs to the men involved. They had no reason for withholding the jobs other than the provision in the agreements which required prior approval by the union acting as exclusive collective bargaining agent. The employers in each case sought the approval of the unions, but were refused, as a result of which they denied the men jobs. Similarly, in *Teamsters,* decided with *Radio Officers,* unlawful discrimination was held to be present where a union was by contract given control over seniority and the union reduced the seniority position of an employee delinquent in his union dues. The employer accordingly denied that employee work assignments he would otherwise have received (347 U. S. at 26). In each the *Radio Officers,* the *Teamsters,* and the instant case the employer's refusal of jobs to the men was based solely on control lodged in the union over the employees' opportunity for employment.

In *Gaynor,* also decided with *Radio Officers,* the union serving as the exclusive collective bargaining agent negotiated an agreement which gave distinct pay and vacation advantages to those employees only who held membership in that union, over nonmembers. In the instant case, the exclusive collective bargaining agent entered into an agreement with the carrier which gave distinct reinstatement advantages to employees who chose to be represented in the handling of claims for reinstatement by the exclusive collective bargaining agent.

In the *Radio Officers* cases this Court held that where the conduct of the employers inherently encourages or discourages union membership, a violation of 8(a)(3) of the

National Labor Relations Act is established. This, it was held, is so even though the employers may have no desire to encourage union membership. "Since such encouragement of union membership is a natural and foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement" (347 U. S. at 52). This Court held that the vesting of control over any aspect of employment in a union or giving advantages to one group of employees because of their union affiliation over another group of employees without similar union affiliations, was necessarily the type of conduct which had the natural and foreseeable consequence of encouraging or discouraging union membership in violation of the National Labor Relations Act (347 U. S. at 45-46). This holding was based on "a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action" (347 U. S. at 46; cf. 51). This Court adverted to both the terms and the history of the union security amendments to the National Labor Relations Act as conclusive that Congress had forbidden utilization of a collective bargaining agreement, which did not contain the permissible form of union security provision, to affect employees' jobs or job opportunities in any way which would encourage or discourage employee choice of unions (347 U. S. at 41-42). It therefore found that "The policy of the Act is to insulate employees' jobs from their organizational rights" (347 U. S. at 40).

However, the court below, by making the absence "of a deliberate hostile bargaining attempt to discriminate against one group of employees in favor of another" (R. 289) controlling, adopted a subjective test, as opposed to the objective test applied by this Court in the *Radio Officers* case. By holding that "It is not fatal that the incidents of the contract may have unfavorable effects on some members of the craft represented relative to conditions of employment" (R. 289), the court ignored the necessary effect of the discrimination here involved to influence em-

ployees to choose the contracting union rather than some other union to represent them.[8] By holding that the Note here involved was valid because the "composition of the roster of employees" of a carrier is a proper subject for collective bargaining (R. 289), the court below ignored the fact that in the Railway Labor Act, as in the National Labor Relations Act, Congress, by the strict limitations it placed on union security agreements, has defined precisely the extent to which a carrier and a union may by collective bargaining agreement interfere with, influence or coerce employees in their choice of representatives.[9] The carrier and the exclusive collective bargaining representative in the instant case did not adopt a union-shop provision in the

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[8] The court below erroneously construed this Court's decision in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, as justifying a contract which may have unfavorable effects on some members of the craft represented relative to conditions of employment (R. 289). This Court was not there faced with differences in treatment which interfered with the employees' choice of bargaining representatives. The employees there were differentiated between on the basis of their military service or lack of it, all union and nonunion members being affected in precisely the same manner (345 U.S. at 331-332, 335). This Court stated that there was nothing in the National Labor Relations Act to "compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees" (345 U.S. at 342). As we have already seen, there are provisions in the Railway Labor Act which do bar a carrier and a union from limiting reinstatement rights in a manner which interferes with employee choice of representatives.

[9] Congress in 1951 recognized that Section 2, Fourth, prohibited all collective bargaining agreements which advantaged or disadvantaged employees on the basis of their choice of bargaining representative. In adopting the Union Shop Amendment to the Railway Labor Act (Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U.S.C. (Supp. V) 152, Eleventh), it provided:

> "(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

agreement.[10] By failing to recognize any policy to insulate an employee's job from his organizational rights, the court below permitted certain aspects of an employee's employment rights to be contingent on the manner in which he exercised his organizational rights.

The instant case therefore presented a situation where the very same type of conduct of employers which was held in *Radio Officers* inherently to encourage or discourage membership in a labor organization in violation of Section 8(a)(3) of the National Labor Relations Act, has been held by the court below not to interfere with, influence or coerce employees in their choice of representatives in violation of Section 2, Third and Fourth, of the Railway Labor Act.

2. The decision of the court below in the instant case is similarly in conflict with the decision of the Court of Appeals for the Fifth Circuit in *NLRB* v. *Lummus Co.*, 210 F. 2d 377 (C.A. 5), and the decision of the Court of Appeals for the Second Circuit in *NLRB* v. *Gottfried Baking Co.*, 33 LRRM 2550 (C.A. 2, February 15, 1954), both cases arising under Section 8(a)(3) of the National Labor Relations Act.

In the *Lummus* case, where two job applicants were told by an employer that they could not be employed without first obtaining clearance from a certain union, the court held that the employer thereby necessarily violated Section 8(a)(3). The order enforced by the court required the employer to cease and desist from conditioning employment upon referral by a union. And in the *Gottfried Bak-*

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[10] Under the Railway Labor Act, not even a union security agreement could have deprived operating employees of the right to belong to and be represented by the Switchmen's Union for it is a union national in scope. According to Section 2, Eleventh (c), the requirements of a valid union-shop provision are satisfied if operating employees choose to become members of any of the unions, national in scope, which accepts those of their craft for membership, and there is no absolute requirement for joining the majority union. Then, only in the event of a failure to pay dues to one of the national unions may the employee's job be interfered with.

*ing Co.* case the court held that the mere execution of a collective bargaining agreement giving preferential employment to members of a certain union, even apart from its actual enforcement, places that union in a position of prestige and power enabling it to further the interest of its members to the disadvantage of non-members, thereby placing a premium upon membership in that union, and falls squarely within the prohibition of Section 8(a)(3) of the National Labor Relations Act.

3. The questions presented are important in the administration of the Railway Labor Act. Basic to all the provisions of the Railway Labor Act is the freedom of employees to self-organization and choice of representatives without interference, influence or coercion by the carrier. As interpreted by the court below, the carrier remains free to interfere with, influence or coerce its employees in the choice of representative so long as it accomplishes this by a collective bargaining agreement which shifts control of employment from the carrier to the union. Likewise the decision below leaves the carrier free to grant advantages to employees who are represented by one union and to withhold such advantages from others, so long as this is accomplished by a collective bargaining agreement. And by emphasizing the absence of a "deliberate hostile" attempt by the carrier to discriminate between union and non-union members, the court below makes the test of carrier violation of the Act the carrier's anti-union or pro-union animus rather than the natural and foreseeable consequences of its conduct.

The decision below means that the employees of industries subject to the Railway Labor Act do not have the same broad protection from employer interference, influence and coercion in their rights to self-organization and collective bargaining which are accorded to employees of other industries, despite the fact that Section 2, Third and Fourth, of the Railway Labor Act parallels Section 8(a)(3) of the National Labor Relations Act.

Although Section 8(a)(3) of the National Labor Relations Act has been before this Court for consideration in numerous cases, its analogue in Section 2, Third and Fourth, of the Railway Labor Act, as amended, has never been before this Court.[11] The importance of this section is reflected in the fact that it is the statutory provision which protects the rights of the Nation's entire force of railroad and airline employees to freedom in choosing their representatives and in joining or refraining from joining labor organizations.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be ganted.

Respectfully submitted,

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*Attorneys for Petitioners.*

April 15, 1954.

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[11] Section 2, Third, of the Railway Labor Act, as originally adopted in 1926, was before this Court in *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548, which was concerned primarily with questions of constitutionality rather than of construction.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| SUPPLEMENTARY STATEMENT OF THE CASE | 2 |
| QUESTIONS PRESENTED | 4 |
| REASONS FOR DENYING THE WRIT | 4 |
| CONCLUSION | 10 |


### CASES CITED


Broady v. Illinois Central R. Co., 191 F. 2d 73, (cert. den. 342 U. S. 897, 72 S. Ct. 231, 96 L. Ed. 672) 8

Brooks v. Chicago, R. I. & P. R. Co., 177 F. 2d 385 8

Brotherhood v. Central of Georgia Ry. Co., 199 F. 2d 384, (cert. den. 73 S. Ct. 648) 8

Butler v. Thompson, 192 F. 2d 831 8

Colbert v. Brotherhood of Railroad Trainmen, 206 F. 2d 9 (C. A. 9) 7, 8, 10

Graham v. Brotherhood of Fireman, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22 7

Hayes v. Union Pacific R. Co., 184 F. 2d 337, (C. A. 9) (cert. den. 340 U. S. 942, 71 S. Ct. 506, 95 L. Ed. 680 7, 10

Order of Railroad Conductors of America v. Southern Railway Co., 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811 7

Radio Officers v. National Labor Relations Board, 347 U. S. 17 9

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 7, 9, 10

Page

Spires v. Southern Railway Co., 204 F. 2d 453, (C. A. 4) ..... 7, 8, 10

Starke v. New York, Chicago & St. L. R. Co., 180 F. 2d 569 ..... 8

Steele v. Louisville & Nashville R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 ..... 7

T. & N. O. R. Co. v. Brotherhood of Railway Steamship Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034 ..... 7

Tunstall v. B. L. F. & E., 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 ..... 7

Virginian Ry. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789 ..... 7

STATUTES CITED

Railway Labor Act, (45 U. S. C., 152), Section 153: First (i) ..... 5, 7

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OCTOBER TERM, 1953

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## No. 705

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SWITCHMEN'S UNION OF NORTH AMERICA, An Unincorporated Labor Union; R. H. MORITZ; L. B. HILL; and V. H. WORKMAN,

*Petitioners,*

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A Corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, An Unincorporated Labor Union,

*Respondents.*

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## BRIEF OF RESPONDENT THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A CORPORATION, IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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The respondent The Ogden Union Railway and Depot Company, a corporation, respectfully prays that petitioners' application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit,

entered in the above entitled case on January 2, 1954, be denied.

## OPINIONS BELOW

The opinion of the District Court (Oral Statement 275-279) is unreported. The opinion of the Court of Appeals (R. 286-290) is reported in 209 F. 2d 419.

## SUPPLEMENTARY STATEMENT OF THE CASE

A supplement to petitioners' statement of facts may serve to clarify the issues presented. This case went to trial in the District Court on the second amended complaint of petitioners seeking to have declared illegal and in violation of the Railway Labor Act (45 U. S. C. 152), a provision in the collective bargaining agreement between the respondent carrier and the respondent Brotherhood of Railroad Trainmen, the bargaining agent for all employes classified as "yardmen" in respondent carrier's operations at Ogden, Utah (R. 99). For ready reference, the disputed provision reads as follows:

> "Note—Reinstatement will not be permitted after the expiration of six months from date of dismissal unless agreeable to the management and the general committee, except that a case pending with either the B. R. T. or O. R. C. at the expiration of the six month period, will not be prejudiced. Where the yardman involved has been out of service six months or less it will not be obligatory to consult the committees representing these classes of employes in considering the case for reinstatement" (R. 5).

Petitioners also prayed for an order of reinstatement to their former employment, with seniority and vacation rights unimpaired, and for judgment against the carrier for all back pay lost (R. 99). The individual petitioners, Moritz, Hill

and Workman, had been dismissed for rules violations by the carrier. They did not choose the bargaining agent respondent Trainmen; but chose the petitioner, Switchmen's Union of North America, to handle their grievance with the carrier (R. 110). The carrier recognized the Switchmen's Union as plaintiffs' representative. Conferences and negotiations were had and correspondence was exchanged between the officers of the carrier and the officers of the Switchmen's Union concerning reinstatement of the three individual petitioners (R. 8, 110). Reinstatement with back pay was first asked by petitioners' representative, which the carrier was unwilling to grant (R. 8, 110). Thereafter, the demand for back pay was withdrawn and the carrier indicated its willingness to reinstate the individual petitioners without back pay (R. 8, 101, 102, 110); but six months having elapsed, the offer was made contingent upon the acquiescence therein of the Trainmen's Union, the bargaining agent, in conformity with the above quoted provision of the contract (R. 8, 111).

The offer was immediately rejected by the Switchmen's Union representing the individual petitioners. The carrier was advised that the request for reinstatement on a leniency basis was withdrawn, the demand for reinstatement with back pay for all lost time was reinstated, and the carrier was given notice that petitioners intended to appeal the grievance to the National Railroad Adjustment Board (Defendant's Exhibit A; R. 281, 282). The matter, however, was not referred to the National Railroad Adjustment Board, but this suit was instituted in the Federal District Court and relief was prayed for as above set forth (R. 99).

The trial court found and entered its decree that the disputed provision was lawful in terms and effect (R. 178, 179), and having heard evidence, concluded and decreed that the evidence was insufficient to warrant a finding that

the respondents, or either of them, had discriminatorily applied the provision in violation of petitioners' rights under the Railway Labor Act (R. 178-9, 180). The court further found that petitioners had not exhausted their administrative remedies under the Railway Labor Act to present their claims to the National Railroad Adjustment Board (R. 178, 179), and decreed that petitioners' remedy, if any, was within the exclusive jurisdiction of the National Railroad Adjustment Board (R. 179, 180). These findings obviously involved a determination by the Federal District Court that it was without jurisdiction. Petitioners' statement on page 7 of their brief that, "the Court of Appeals *erroneously* stated that the District Court had dismissed the case for want of jurisdiction", does not therefore accord with the facts.

## QUESTIONS PRESENTED

I. Is the provision of the contract in question illegal per se and on its face violative of any of petitioners' rights under the Railway Labor Act?

II. Is the policing and granting of relief from the discriminatory application of a contract not illegal on its face, entered into pursuant to the National Railway Labor Act, within the jurisdiction of the federal courts?

III. Should the trial court's finding that the evidence was insufficient to prove a discriminatory application of the contract by respondents be disturbed?

## REASONS FOR DENYING THE WRIT

I. The contract is not illegal in terms and effect. If the jurisdiction of the court is dependent upon illegality in

the contract which is violative of petitioners' rights under the Railway Labor Act, then the Court of Appeals was correct in its statement that, "Jurisdiction of the court is determined by resort to the contract which must speak for itself." The challenged provision pertains to wages, hours and working conditions, proper subjects of a bargaining agreement under the Railway Labor Act, and respondent's position is best stated by the Court of Appeals, to wit: "There is nothing illegal per se in the provision forbidding reinstatement after six months from the date of dismissal for cause, without the consent of the bargaining agent and the carrier." The additional comment by the Court of Appeals to the effect that, "The provision is intended to do no more than regulate the composition of the roster of employes," is not, as suggested by petitioners herein, an admission by the Court of the illegality of the contract, if the Court's statement is considered in the light of the explanation in the record as to the reasons for the rule requiring consent of the bargaining agent, after the expiration of six months, to the reinstatement of an employe who has been dismissed for cause. The disputed provision has been in all agreements between respondent carrier and the bargaining agent since the year 1925 (R. 222), evidencing the fact that the dispute in the present instance was handled in the "usual manner"—the method of handling in operation for over twenty-five years between the carrier and its employes. This accords with Section 153, First (i), of the Railway Labor Act providing, "Disputes between an employe or group of employes and a carrier or carriers, growing out of grievances * * * concerning rates of pay * * * shall be handled in the usual manner up to and including the chief operating officer * * *."

The disputed contract provision is applicable to and binding upon members of the Trainmen's Union, the bar-

gaining agent, as well as members of a minority union such as the individual petitions herein. It is the method chosen by the majority of the employes to protect all of the employes in their seniority rights. As explained by testimony in the record, its purpose is to prevent a company official from reinstating an employe without the employes themselves having a voice therein after expiration of six months, or a year, or two years, to the injury of all employes with seniority positions below the man reinstated (R. 222). Someone has to speak on behalf of all of the employes in this situation. What is more logical, democratic and fair to all the employes than to permit the bargaining agent representing the majority of the employes to speak for all whose rights are involved. And in this situation, what is good for the employes is also good for management. Here is a clear-cut provision relative to a proper bargaining matter, to-wit, reinstatement. It is management that reinstates and not the bargaining agent, and without such a provision the bargaining agent has no check upon the management in connection with reinstatement. Without such a provision each case of reinstatement would be a potential source of conflict and many cases of reinstatement would be carried to the Railroad Adjustment Board that are now settled at the conference table in consonance with the basic design of the Railway Labor Act. It is this right, placed in the logical representative, the bargaining agent, to police reinstatement by management that is under attack and which, it is claimed, is a deliberate hostile bargaining attempt on the part of the bargaining agent to discriminate against employe members of minority unions. The contract itself does not by its terms provide for any such illegal practice, nor does it, as was pointed out by the Court of Appeals, contain "invidious proscriptive factors

that are inimical to statutory or constitutional rights such as racial discrimination", and such as were struck down in

*Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173;

*T. & N. O. R. Co.* v. *Brotherhood of Railway Steamship Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034;

*Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789;

*Tunstall* v. *B. L. F. & E.*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187;

*Graham* v. *Brotherhood of Firemen*, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The Tenth Circuit Court of Appeals here follows the rationale of *Hayes* v. *Union Pacific Railroad Co.*, 184 F. 2d 337, cert. den. 340 U. S. 942, 71 S. Ct. 506, 95 L. Ed. 680, from the Ninth Circuit; *Spires* v. *Southern Railway Co.*, 204 F. 2d 453, from the Fourth Circuit; and *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9, from the Ninth Circuit.

From the complaint it is obvious, and throughout the proceedings it was admitted, that the carrier dealt with the chosen representatives of the individual petitioners. Since no agreement was reached, the petitioners had an adequate remedy by referring the dispute to the National Railroad Adjustment Board under 45 U. S. C. A., Section 153, First (i). The intervention of the federal court was neither necessary for relief by way of declaratory judgment or injunction, nor permissible under the Railway Labor Act and the decisions holding that exclusive jurisdiction over such a dispute lies with the Railroad Adjustment Board.

*Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795;

*Order of Railroad Conductors of America* v. *Southern Railway Co.*, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811;

*Colbert* v. *Brotherhood of Railroad Trainmen*, supra;

*Spires* v. *Southern Railway Co.*, supra;

*Brotherhood* v. *Central of Georgia Ry. Co.*, 199 F. 2d 384, cert. den. 73 S. Ct. 648;

*Butler* v. *Thompson*, 192 F. 2d 831;

*Broady* v. *Illinois Central R. Co.*, 191 F. 2d 73, (cert. den. 342 U. S. 897, 72 S. Ct. 231, 96 L. Ed. 672);

*Starke* v. *New York, Chicago & St. L. R. Co.*, 180 F. 2d 569;

*Brooks* v. *Chicago, R. I. & P. R. Co.*, 177 F. 2d 385.

II. Exclusive jurisdiction to grant relief in disputes involving the interpretation and application of a contract not illegal in terms or effect lies with the National Railroad Adjustment Board. The actual commission of a discriminatory act under a contract legal in terms and effect does not taint the contract with illegality so as to invest the federal courts with jurisdiction. Any contract is subject to breach and defaults in performance, and discriminatory acts may be committed either by management or the bargaining agent in connection with any collective bargaining agreement entered into under the Railway Labor Act. But such breaches in connection with a contract entered into pursuant to the Railway Labor Act, the contract being valid

in terms and effect, are to be corrected by the Railroad Adjustment Board and are corrected by the Railroad Adjustment Board in their "interpretation" that the breach or discrimination contravenes the legitimate objects of the agreement, and the jurisdiction to determine such questions is exclusive with the Railroad Adjustment Board. For such breaches they can and do afford relief. (*Slocum* v. *Delaware, L. & W. R. Co., supra*). There is nothing in this case except the interpretation and application of an agreement concerning rates of pay, rules, and working conditions.

*Radio Officers Union of the Commercial Telegraphers Union (AFL)* v. *National Labor Relations Board,* 347 U. S. 17, cited by petitioners herein, is concerned with factual situations which were held to be discriminatory. The *Radio Officers* case and the other cases consolidated in that opinion are instructive on the question of what acts constitute illegal discrimination and as such will doubtless furnish important guideposts to the Railroad Adjustment Board, as well as the National Labor Relations Board, but the question of jurisdiction was not involved. In the instant case, respondent's contention is that the National Railroad Adjustment Board is vested with exclusive jurisdiction to "interpret" the contract, to decide with respect to its "application", and in so doing determine whether or not the contract has been discriminatorily applied, as the National Labor Relations Board did in the first instance in the cases referred to.

III. If we are correct in either of the two foregoing questions discussed, the third question, namely, whether or not the trial court's finding that the contract had not been discriminatorily applied, is actually moot. But assuming the District Court had jurisdiction to entertain the action and jurisdiction to determine the question of whether the contract had been discriminatorily applied or not and grant relief by way of injunction or declaratory judgment, nothing

in the record warrants the court in granting a writ of certiorari to review the trial court's finding that the evidence failed to show that respondents had engaged in an illegal and discriminatory application of the contract in violation of petitioners' rights.

## CONCLUSION

The questions presented are not new to this court, but have been settled in the *Slocum* case and other cases cited herein. There seems to be no conflict in the opinions of the Circuit Courts on the questions here presented. The Tenth Circuit Court in this instance has not decided the questions herein presented in conflict with decisions of other Circuit Courts, but on the contrary, the decision is in accord with the holding of the Ninth Circuit in the *Hayes* and *Colbert* cases, supra, and the Fourth Circuit in the *Spires* case, supra.

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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The Ogden Union Railway
and Depot Company.

May 10, 1954

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| QUESTIONS PRESENTED | 2 |
| STATUTES INVOLVED | 2 |
| STATEMENT | 3 |
| PETITIONERS' REASONS NOT SUFFICIENT FOR ALLOWANCE OF WRIT | 5 |
| CONCLUSION | 10 |


## AUTHORITIES CITED


Broady v. Illinois Central R. Co., 191 F. 2d 73 (7 C.C.A.) (cert.den. 342 U.S. 897, 72 S. Ct. 231, 96 L. Ed. 672) ..... 5, 6

Brooks v. Chicago, R. I. & P. R. Co., 177 F. 2d 385 (8 C.C.A.) ..... 6, 8

Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co., 199 F. 2d 384 (5 C.C.A.) (cert. den. 345 U.S. 908, 73 S. Ct. 648) ..... 5, 6, 8

Butler v. Thompson, 192 F. 2d 831 (7 C.C.A.) ..... 6, 8

Colbert v. Brotherhood of Railroad Trainmen, 206 F. 2d 9 (9 C.C.A.) (cert. den. 74 S. Ct. 320, 22 L.W. 3186, rehearing den. 74 S. Ct. 514, 22 L.W. 3228) ..... 5, 6,8

Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681 ..... 7

Hayes v. Union Pacific R. Co., 184 F. 2d 337 (Dist. Ct. Op. 88 Fed. Supp. 108) ..... 8

National Labor Rel. Bd. v. Gottfried Baking Co., 210 F. 2d 772 (2 C.C.A.) ..... 9

National Labor Rel. Bd. v. Lummus Co., 210 F. 2d 337 (5 C.C.A.) ..... 9

Order of Railroad Conductors v. Pitney, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318 ..... 5

Owens v. Union Pacific R. Co., 319 U.S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683 ..... 2

Radio Officers' Union, etc., v. National Labor Rel. Bd., 347 U.S. 17, 74 S. Ct. 323 ..... 8

TABLE OF CONTENTS—(Continued)


*Page*

Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 ..... 5, 6

Spires v. Southern Railway Co., 204 F. 2d 453 (4 C.C.A.) ..... 6, 8

Starke v. New York, Chicago and St. Louis R. Co., 180 F. 2d 569 (7 C.C.A.) ..... 6, 8

Steele v. Louisville & N. R. Co., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 ..... 7

United R. R. Operating Crafts v. Northern Pac. Ry. Co., 208 F. 2d 135 (9 C.C.A.) (cert. den. 74 S. Ct. 529, 22 L.W. 3236) ..... 5

United Railroad Operating Crafts v. Wyer, 205 F. 2d 153 (7 C.C.A.) (cert. den. 74 S. Ct. 531, 22 L. W. 3236) ..... 5


STATUTE CITED


45 U.S.C.A., Section 153, First (i) ..... 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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No. 705

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SWITCHMEN'S UNION OF NORTH AMERICA, an unincorporated labor union; R. H. MORITZ; L. B. HILL, JR.; and V. H. WORKMAN, *Petitioners*,

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, a corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated labor union, *Respondents*.

---

## BRIEF OF RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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(Numerals in parenthesis refer to pages of the printed record and italics are ours.)

### OPINIONS BELOW

The opinion of the District Court (oral statement R. 275-279) is unreported. The opinion of the United States Court of Appeals, Tenth Circuit, is found at R. 286-290, and is reported in 209 F. 2d 419.

## QUESTIONS PRESENTED

The petitioners seek to present questions not involved in this case. The United States District Court of Utah based its opinion primarily upon the proposition that the judiciary had no jurisdiction of this cause until the remedies of petitioners had been exhausted before the National Railroad Adjustment Board, the tribunal created by Congress in the Railway Labor Act to handle and process disputes such as here involved.

The United States Court of Appeals, Tenth Circuit, did not reach the merits of the case but held unequivocally that the judiciary had no jurisdiction because the remedies provided by Congress before the National Railroad Adjustment Board had not been exhausted by petitioners. Hence, the questions and specifications of errors presented by petitioners are not properly here. The one question involved in this case is whether or not the judiciary has jurisdiction to hear disputes between employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions where the complaining party has not exhausted his remedy before the said Adjustment Board.

This Court will not consider questions not reached by the Circuit Court. *Owens v. Union Pacific R. Co.*, 319 U.S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

## STATUTES INVOLVED

The Statute with which this Court is directly concerned here is 45 *U.S.C.A.*, Section 153, First (i), being in Section 3 of the Railway Labor Act, which provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

**STATEMENT**

The statement of the case contained in the petition is accurate except as to petitioners' construction of the decisions of the lower courts. The petition is inaccurate when it states that the trial court did not dismiss the case for want of jurisdiction.

In making its ruling the trial court orally stated:

> "It is the judgment of the Court that the administrative remedy has not been exhausted in this matter. It is further the judgment of the Court that he has no jurisdiction in this matter, that under the Act of Congress it should have been submitted to the Railway Adjustment Board for determination." (278)

The trial court's Conclusion of Law No. III stated:

> "That the plaintiffs have not exhausted the administative remedy which they have under the Railway Labor Act to present their claims before the National Railroad Adjustment Board." (179)

These two quotations clearly establish that the primary basis of the trial court's decision was lack of jurisdiction to hear the cause before the administrative remedy had been exhausted.

The Circuit Court based its opinion upon this same proposition. That court concluded its opinion with these words:

> "* * * And since provision is made under 45 U.S. C.A. Sec. 153, First (i) for referral of a dispute by either party to the Railway Adjustment Board upon a failure to reach an agreement at the company level, exclusive jurisdiction lies in that tribunal, and not in the Federal courts." (290)

The Rule and Note in question have been in all agreements concerning rates of pay, rules, and working conditions between defendant carrier and its employees since 1925. Said Rule and Note prescribe the usual manner of handling grievances and disputes on a company level (175, 222).

The Switchmen's Union processed the claims for reinstatement and back pay of the individual plaintiffs with company officials in the usual manner as provided in 45 U.S.C.A., Sec. 153 First (i), above quoted. When that process had been completed and the grievances were disallowed by company officials the Switchmen's Union decided to no longer follow the statute by presenting the matter to the National Railroad Adjustment Board, but decided to resort to the courts to strike down this Rule and Note.

Petitioners omitted from their statement of the case the significant fact found by the trial court that the questioned Rule and Note are necessary to protect and to maintain the seniority rights of employees of the defendant carrier (176, 224-227). Without this provision the carrier could reinstate employees after they had been discharged at any time in the past, thereby upsetting the entire seniority

roster. The employees should have something to say about this matter, and the logical representative would be the bargaining agent, duly elected by the majority of employees, in this case, the Brotherhood.

## PETITIONERS' REASONS NOT SUFFICIENT FOR ALLOWANCE OF WRIT

Petitioners have not squarely met the holding of the lower courts and have not recognized the strong and uniform authorities construing the Railway Labor Act in accordance with that holding. They cite cases construing the National Labor Relations Act, in which the administrative remedies had been exhausted before presentation to the courts.

This Court has consistently denied certiorari where lower courts have held under the Railway Labor Act that plaintiffs must first seek redress from the National Railroad Adjustment Board and that courts do not have jurisdiction until that remedy is exhausted. See *Colbert v. Brotherhood of Railroad Trainmen,* 206 F. 2d 9 (9 C.C.A.) (cert. den. 74 S. Ct. 320, 22 L.W. 3186, rehearing den. 74 S. Ct. 514, 22 L.W. 3228); *Broady v. Illinois Central R. Co.,* 191 F. 2d 73 (7 C.C.A.) (cert. den. 342 U.S. 897, 72 S. Ct. 231, 96 L. Ed. 672); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.,* 199 F. 2d 384 (5 CC.A.) (cert. den. 345 U.S. 908, 73 S. Ct. 648); *United R.R. Operating Crafts v. Northern Pac. Ry. Co.,* 208 F. 2d 135 (9 C.C.A.) (cert. den. 74 S. Ct. 529, 22 L.W. 3236); *United Railroad Operating Crafts v. Wyer,* 205 F. 2d 153 (7 C.C.A.) (cert. den. 74 S. Ct. 531, 22 L.W. 3236).

This Court has held that neither the Federal Courts, *Order of Railroad Conductors v. Pitney,* 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318, nor the State Courts, *Slocum v.*

*Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795, have jurisdiction to originally hear controversies which are properly submissible to the National Railroad Adjustment Board.

The courts have generally held that the foregoing cases decided by this Court have effectively denied to the judiciary jurisdiction to handle disputes between employees and carriers involving reinstatement, restoration of full rights of seniority and back pay. *Brooks v. Chicago, R.I. & P.R. Co.*, 177 F. 2d 385 (8 C.C.A.); *Starke v. New York, Chicago and St. Louis R. Co.*, 180 F. 2d 569 (7 C.C. A.); *Broady v. Illinois Cent. R. Co.*, 191 F. 2d 73; *Butler v. Thompson*, 192 F. 2d 831 (7 C.C.A.); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 199 F. 2d 384 (5 C.C.A.); *Spires v. Southern Railway Co.*, 204 F. 2d 453 (4 C.C.A.); *Colbert v. Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9 C.C.A.).

The policy behind the congressional enactment referring these disputes to an administrative tribunal is stated by this Court in the *Slocum* case, supra (U.S. p. 243):

> "• • • The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

Maintenance and protection of seniority rights is a proper subject to incorporate in an agreement relating to rates of pay, rules, or working conditions. Someone has to supervise its maintenance in behalf of the employees, and the logical choice should be the bargaining agent elected to that position by a majority of the employees and a party to the agreement to be construed.

This Court in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173, recognized that uniformly favorable effects on everyone is not a necessity to the validity of a bargaining agreement or a provision therein. This Court there stated (U.S. p. 203):

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit."

Similar language was used in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681.

A number of cases have involved discrimination between various groups of employees, and courts have uniformly held that redress from the National Railroad Adjustment Board must first be sought and the judiciary has no jurisdiction in the first instance except where constitutionally prohibited racial discrimination has resulted which this Court has declared to be "invidious." See *Steele* case, supra. For instance, a provision limiting representation and appeal to the bargaining agent on a company level

has been held valid. *Brooks* and *Butler* cases, supra. Likewise courts have held the validity of seniority right provisions in bargaining agreements which have varying effects on different employees should be submitted to the National Railroad Adjustment Board. See *Spires, Colbert,* and *Starke* cases, supra.

The Court of Appeals for the Ninth Circuit in *Hayes v. Union Pacific R. Co.,* 184 F. 2d 337 (Dist. Ct. Op. 88 Fed. Supp. 108), held the judiciary is not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements. That function should be performed by the tribunal created by Congress for that purpose. As stated by the Court in *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.,* supra, (p. 385):

> "Only after the Adjustment Board has acted can it definitely appear that relief by the courts is necessary to insure compliance with the statute. Order of Conductors v. Pitney, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318."

We will now take up in its order each of the reasons advanced by petitioners for the allowance of the writ herein and demonstrate that they are not sufficient for the purpose claimed.

1. Reliance is placed upon *Radio Officers' Union, etc., v. National Labor Rel. Bd.,* 347 U.S. 17, 74 S. Ct. 323, for allowance of the writ herein. Concededly that case arises under the National Labor Relations Act not the Railway Labor Act. There are two very significant and controlling distinctions between that case and the one at bar. In the first place no jurisdictional ground was involved or urged in the *Radio Officers'* case. Such contention is the main contention here and the one upon which the lower courts

based their decisions. Secondly, the parties in the Radio Officers' case had complied with the Federal Statutes and exhausted their administrative remedies before the National Labor Relations Board. That board had decided the case and made an order which it sought to have enforced by the judiciary. Here there has been no presentation to the administrative board created by the Railway Labor Act.

2. Petitioners rely upon *National Labor Rel. Bd. v. Lummus Co.*, 210 F. 2d 377 (5 C.C.A.), and *National Labor Rel. Bd. v. Gottfried Baking Co.*, 210 F. 2d 772 (2 C.C.A.). Here again petitioners fail to see the significant distinction between those cases and the case at bar. In the case at bar no effort has been made to pursue the remedy afforded by the National Railroad Adjustment Board. In the two cases cited the administrative remedy of the parties had been exhausted and appeal for assistance from the judiciary was made only after the administrative remedy had been completed.

3. Under this point petitioners plead that the carrier may interfere with, influence or coerce its employees in the choice of representatives by means of a collective bargaining agreement and that employees of railroads do not have the same protection from employers' interference, influence and coercion afforded employees of other industires coming under the National Labor Relations Act.

The difficulty with the petitioners' position here is that they have not sought the proper remedy to procure protection of their rights alleged to have here been violated. The sole problem involved before this Court is a jurisdictional one. Petitioners here again avoid meeting the only proposition and the only question which could be before this Court.

## CONCLUSION

The respondent, Brotherhood of Railroad Trainmen, respectfully submits that the decisions of the lower courts in requiring first a resort to the administrative tribunal for relief and holding no judicial jurisdiction present, correctly state the law and this Court should not, as it has not in a number of cases of recent date, grant a petition and burden itself and other courts with the function of policing bargaining agreements made pursuant to the Railway Labor Act.

We respectfully request that the petition be denied.

Respectfully submitted,

CALVIN W. RAWLINGS,
BRIGHAM E. ROBERTS,
*Counsel for Respondent.*

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FILED
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HAROLD B. WILLEY,

NO. 705

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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SWITCHMEN'S UNION OF NORTH AMERICA, An Unincorporated Labor Union; R. H. MORITZ; L. B. HILL; and V. H. WORKMAN, *Petitioners,*

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A Corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, An Unincorporated Labor Union.

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**On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit**

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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**On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit**

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. Despite the statements in the briefs of the Brotherhood of Railroad Trainmen (pp. 3-4, 7-8, 10) and of the carrier (p. 4) to the effect that the case was dismissed for lack of jurisdiction, the judgment entered by the District

Court (R. 179-180) and affirmed by the Court of Appeals (R. 291) constituted an adjudication of the case on the merits. This judgment expressly adjudged that the contract, here under attack, was lawful in terms and effect and that it had not been applied in violation of any rights of the Plaintiffs under the Railway Labor Act (R. 179-180). The Court of Appeals in its opinion stated that there was nothing illegal about this contract (R. 289). Hence both courts below did pass upon the merits of the issues tendered to this Court by the petition for a Writ of Certiorari.

2. Nor are Respondents correct in their assumption that the National Railroad Adjustment Board is the administrative agency vested by the Railway Labor Act with the administration of that Act in a manner parallel to the administration of the National Labor Relations Act by the National Labor Relations Board (Trainmen's Union Br., p. 9; Railway Co. Br., p. 9). The National Railroad Adjustment Board was not created by Congress for the purpose of administering the provisions of the Railway Labor Act (45 U.S.C. 152) which parallel the unfair labor practice and representation provisions of the National Labor Relations Act (29 U.S.C. 158 and 159). Rather the National Railroad Adjustment Board was created primarily for the purpose of interpreting and applying collective bargaining agreements (45 U.S.C. 153, First (i)), a function for which the National Labor Relations Act made no express provision by the establishment of, or delegation to, an administrative agency or otherwise. See Lloyd K. Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale Law Journ. 567 (1937); *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U. S. 711, 722, 726-727 (1945), affirmed on rehearing, 327 U. S. 661 (1946).

The Railway Labor Act did not make any provision for the administration by an administrative agency of its pro-

visions making carrier interference, influence or coercion in the choice of representatives illegal. Accordingly, it has uniformly been held that these provisions of the Railway Labor Act are to be enforced by the courts. *Texas & New Orleans Ry. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 566-568 (1930); *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 545 (1937); *Myers* v. *Louisiana & A. Ry Co.*, 7 F. Supp. 92 (W. D. La., 1933); *Myers* v. *Louisiana & A. Ry. Co.*, 7 F. Supp. 97 (W. D. La., 1934); *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't.*, 93 F. 2d 340 (C.A. 6, 1937); *System Federation No. 91* v. *Reed*, 180 F. 2d 991 (C.A. 6, 1950); *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R.R. Co.*, 201 F. 2d 36 (C.A. 4, 1953), certiorari denied, 345 U.S. 992.

3. The briefs in opposition (Trainmen's Union Br., p. 4; Railway Co. Br., p. 6) defend the grant to the Trainmen's Union of unlimited discretion over reinstatements after six months of employees not represented by it or the Order of Railway Conductors, as a proper protection of seniority. We have always conceded that the Trainmen's Union had a legitimate interest in the establishment of proper objective standards respecting seniority. However, vesting in it any uncontrolled discretion over employment rights violates the Railway Labor Act. The following statement of the National Labor Relations Board is here applicable (*Pacific Intermountain Express Co.*, 107 NLRB No. 158, 33 LRRM 1252, 1253-1254):

> "The objective standards relevant to a determination of seniority generally derive from the employment history of the employees involved, and that information is, as a rule, peculiarly within the knowledge of the employer. Indeed, the area in which the union is likely to be more informed than the employer with respect to the employer's employees is that pertaining to employees' union membership or to the employees' compliance with the union's constitution, by laws, or other regulations—subjects however, which ob-

viously are not relevant considerations in the implementation of a seniority provision. We can therefore see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a non-discriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union. Accordingly, the inclusion of a bare provision, like that in the 1949 contract, that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the Union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that, the inclusion of a statement, like that in the 1952 contract, that seniority will be determined without regard to union membership is not itself enough to cure the vice of giving to the Union complete control over the settlement of a 'controversy' with respect to seniority."

Indeed, the courts below were not asked by the Petitioners to indulge in the presumption on which the National Labor Relations Board premised its above quoted decision. For in the instant case there is undisputed evidence that two responsible officials of the Trainmen's Union assured Moritz that he would be reinstated to employment with the carrier immediately if applied for membership in, and was accepted by, the Trainmen's Union (R. 191-193).

Respectfully submitted,

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